No. 88-1367

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

A. G. BOONE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the record contains substantial evidence supporting the National Labor Relations Board's findings that petitioner violated the National Labor Relations Act by laying off employees and relocating a trucking terminal because the employees at the terminal engaged in union activities protected by the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 863 F.2d 946. The decision and order of the National Labor Relations Board (the NLRB or the Board) (Pet. App. 27-57), which incorporates findings, conclusions, and a proposed order by an administrative law judge (Pet. App. 58-165), are reported at 285 N.L.R.B. No. 133.

JURISDICTION

The opinion of the court of appeals was filed on December 9, 1988. The petition for a writ of certiorari was filed on February 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a trucking firm that operates in the southeastern United States, seeks further review of a determination that it violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3) and (1), when it laid off workers and closed its terminal in Montvale, Virginia, in response to successful efforts by respondent Teamsters Local No. 171 (the Union) to represent the employees there.

1. The facts are set forth at length in the decision of the administrative law judge (ALJ); with respect to the issues raised by the petition, that decision was adopted by the Board. Pet. App. 58-149.

Throughout the relevant period, petitioner specialized in the transport of groceries and related items, including items distributed by the Kroger food chain and other Kroger subsidiaries. Its headquarters and principal terminal were in Charlotte, North Carolina. From 1979 through 1986, it also operated from a terminal in Montvale, Virginia. Pet. App. 62.

a. Early in 1986, the Union began a campaign to organize employees at the Montvale terminal, and, on February 20, it demanded recognition from A. G. Boone, petitioner's owner and president. Boone refused to recognize the Union without an election. The Union filed a representation petition, and an election was scheduled for April 13. Pet. App. 66.

During the election campaign, Montvale Terminal Manager McGalliard and Assistant Terminal Manager Dickenson repeatedly told Montvale drivers that petitioner would close the terminal if it were unionized. McGalliard told drivers that, if the Union won the election, "they would close the terminal and * * * go back to Charlotte," and that "the drivers would probably be out of a job." Just

before the election, he asked a driver about the "union deal," and then said that "if the union comes in, I got the lock." Dickenson told two drivers to "try to talk the union down because if the union [was] voted in, Mr. Boone would lock the gate." He told another driver that he knew of five drivers "in on this union deal," and that as soon as he found out who the sixth driver was, he would "fire the s.o.b." Pet. App. 68-70.[1]

The Union nevertheless won the April 13 election by a vote of 16 to 6, and was certified as the bargaining representative for employees at the Montvale terminal on April 28 (Pet. App. 68-70).

b. Before the election, McGalliard told two Montvale drivers that work delivering flowers for Kroger would be discontinued if the Union won the election. Pet. App. 68. After the election, those flowers runs were transferred to petitioner's non-union terminal in Anderson, South Carolina (*id.* at 71), and Dickenson told another two drivers that the transfer was a result of the fact that the Union had won the election at Montvale (*id.* at 72-73). (In fact, the ALJ found, those runs had been transferred at Kroger's direction because of dissatisfaction with Montvale delivery arrangements. *Id.* at 75-77.) At about the same time, Dickenson told a driver that Boone would not negotiate a contract with the Union—referring to a nearby Pepsi-Cola plant where management had dragged out negotiations for five years after drivers had voted to unionize. *Id.* at 76.

Approximately a week after the election, petitioner transferred to its Charlotte terminal six runs previously

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[1] Prior to the election campaign, Montvale employees had been warned against participating in union activity. Two drivers, hired in 1981 and 1982, were told by Dickenson that, if a union ever came into the Montvale terminal, it would be closed (Pet. App. 66).

assigned to Montvale. Pet. App. 74-75. On May 3, petitioner notified the two Montvale drivers with the least seniority that they were being laid off for lack of work. *Id.* at 75.

On approximately June 13, Kroger closed its Roanoke bakery, which accounted for approximately one-seventh of petitioner's Montvale business. The same day, petitioner notified the four most junior Montvale drivers and one utility man (24% of its work force there) that they were terminated effective June 14, stating that the layoff was necessitated by the loss of a portion of the terminal's business. Pet. App. 77-79.

c. Petitioner's first meeting with the Union took place four days later, on June 17. Boone opened the meeting by presenting the Union with a notice that had been posted at the terminal the same day, stating that the Montvale operation would "be closed in the near future" due to the permanent closing of the Roanoke bakery. The notice added that part of the Montvale business would be moved to Charlotte, and that petitioner would open a "drastically reduced 'skeleton' " terminal in the vicinity of Lynchburg. Employees who were interested in working at Lynchburg or Charlotte were invited to sign the notice. Boone told the Union negotiators that he had not yet found a new location in the Lynchburg area, but that the closing of the bakery required him to move. He indicated that he would transfer five or six drivers to Lynchburg and would offer transfers to Charlotte to four drivers, but that the rest of the Montvale drivers would be terminated. He added that the relocation would take place regardless of anything the Union might do. Pet. App. 81-83, 85.

At a meeting the next day, June 18, the Union negotiators presented statistics which, they argued, demonstrated that there were more runs available at Montvale than there were drivers to handle them. Peti-

tioner made no immediate response, but, on July 6, recalled two of the drivers that it had laid off in mid-June. At a July 1 meeting, Union negotiators again argued that there was sufficient work to support the Montvale terminal and objected to petitioner's use of drivers from Charlotte to handle runs previously assigned to Montvale. Boone responded that he would put up a notice asking drivers if they were interested in transfers to Charlotte or elsewhere within 60 days, and would proceed with the announced changes in operations regardless of the Union's objections. Pet. App. 91-94.

On July 24, petitioner posted a notice at the Montvale terminal stating that the operation would move to Madison Heights on approximately August 10. The notice advised that there were six openings for drivers at Madison Heights, that those openings would be made available to applicants from Montvale on the basis of seniority, and that four drivers would be allowed to relocate from Montvale to Charlotte. The remainder of the Montvale employees, the notice said, would be permanently laid off. Pet. App. 98-99.

In response to this notice, the employees voted to strike the Montvale terminal on August 17. The strike began as scheduled. Pet. App. 99-100. Petitioner accelerated the move to Madison Heights in response to the strike. *Id.* at 103. Two days later, the strike ended and the Union requested reinstatement of all striking employees. Boone replied that petitioner would employ the three most senior employees at Madison Heights, effective August 24, on condition that there would be no future work stoppages without proper notification. He added that the Charlotte facility still needed some drivers, but that all other Montvale employees "will be placed in permanent layoff." On August 21, Boone sent permanent layoff notices, effective

August 22, to seven Montvale drivers "due to the reduction in business and the ensuing realign[ment]." *Id.* at 100-103.

Thereafter, eight drivers and one utility man were employed at the Madison Heights terminal, under the supervision of former Montvale Assistant Manager Dickenson. Of the drivers who had participated in the strike, only two were transferred to Madison Heights. Notwithstanding petitioner's earlier statements that jobs at Madison Heights would be available on the basis of seniority, drivers who had participated in the strike were passed over in favor of employees with less seniority who had stayed on the job. Pet. App. 103-104.

d. After the layoffs and relocation, petitioner solicited signatures on a petition seeking the ouster of the Union. The petition was initiated by a driver, but Dickenson had the petition typed, kept it in his office, and asked employees to sign it when they returned from their runs. Pet. App. 104-106.

e. On the basis of these findings, the ALJ concluded that petitioner had committed multiple violations of Section 8(a)(1), (3) and (5) of the NLRA, 29 U.S.C. 158(a)(1), (3) and (5). Pet. App. 108-147.

2. The Board, acting through a panel of three of its members, affirmed the findings and conclusions of the ALJ with respect to the violations at issue in this Court.[2]

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[2] Members of the panel filed majority and dissenting opinions which adopted, supplemented, qualified, and reversed certain of the ALJ's findings and conclusions. Pet. App. 27-51. Accordingly, for purposes of judicial review, the Board's decision consists of the ALJ's decision as supplemented and modified by the panel's opinions.

The Board affirmed all of the ALJ's findings of violations with the exception of the finding that petitioner violated Section 8(a)(5) by instituting a wage increase without first bargaining with the Union. Pet. App. 28-29, 41-43. That matter is not encompassed by the petition.

a. The Board affirmed without discussion the ALJ's conclusions that petitioner had committed twelve violations of Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1). Those violations included petitioner's threats to close the Montvale terminal, to transfer work to other terminals if the Union became the employees' bargaining representative, and to fire workers for engaging in union activities. The Board also affirmed the ALJ's conclusions that petitioner had violated Section 8(a)(1) by threatening to refuse to bargain in good faith with the Union, interrogating employees about their union activities, conditioning the reinstatement of striking employees upon the waiver of their right to strike freely, and assisting in the preparation and circulation of an anti-union petition. Pet. App. 28 (incorporating *id.* at 108-114).

b. The Board agreed with the ALJ that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), when, in retaliation for its employees' having selected the Union to represent them, it (i) laid off employees at the Montvale terminal in May, (ii) laid off additional employees in June, and (iii) closed the Montvale terminal, relocated to Madison Heights, and discharged a number of the Montvale employees. The Board discussed at length, and rejected, petitioner's contentions that these actions resulted from economic decisions untainted by anti-union animus. Pet. App. 27-40. One member of the panel, Chairman Dotson, dissented from the findings that the layoffs in May and June violated Section 8(a)(3) and (1). Pet. App. 46-51.

With respect to the layoffs of two employees in May, the majority of the panel emphasized the ALJ's finding that those layoffs had taken place "against a background of intense union animus" just three weeks after the Union had won the representation election. Pet. App. 30. The

majority rejected petitioner's argument that the layoffs were necessitated by the Montvale terminal's loss of the Kroger flower runs, finding that in the context of Montvale's business as a whole, those runs were "not significant." *Id.* at 32.

The majority of the panel also found that the layoffs of four additional employees in June "represented a further attempt by [petitioner] to fulfill its preelection threats and to close the Montvale facility," rather than a business decision taken in response to the closing of Kroger's Roanoke bakery. Pet. App. 36. The majority referred with approval to the ALJ's findings that petitioner had "resorted to 'overkill' when it laid off more drivers than it could afford to do without (approximately 24 percent of its work force in response to an approximately 14-percent reduction in its work)," that the announced layoffs had occurred without any efforts similar to those undertaken in the past to obtain replacement work, and that petitioner's asserted economic defense "was a pretext." *Id.* at 34-35. The majority of the panel concluded "that the economic data provided by [petitioner] is not sufficient to overcome the strong prima facie case established by the General Counsel by the preelection threats and the developing pattern of the fulfillment of those threats." *Id.* at 36-37.

With respect to petitioner's relocation of its Montvale operation, and the layoffs of seven employees in the process, all members of the Board panel found "no merit" in petitioner's contention "that the closing of the Montvale terminal was an economic decision motivated solely by the closing of the Roanoke bakery." Pet. App. 38. The Board said that petitioner had "failed to demonstrate a legitimate reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights when it was able to continue to operate its Montvale terminal with enough work for 15 drivers after the Roanoke bakery closing." *Id.* at 39. The Board concluded (*id.* at 40):

> The clear alternative explanation for the move is that [petitioner] wished to rid itself of the Union at the Montvale location by opening a significantly smaller facility elsewhere, [where] it employed only two of the employees who had participated in the strike.[3]

c. Finally, the Board found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain—or acting unilaterally—with respect to various matters, including the May and June layoffs, the relocation to Madison Heights and related layoffs, and changes in work assignment procedures. Pet. App. 28 (incorporating *id.* at 127-129, 136-137, 140-142).[4]

d. In its remedial order, the Board ordered petitioner, *inter alia*, to reinstate and make whole the employees it had unlawfully terminated, to reestablish the Montvale terminal, and to restore the work formerly performed there by employees who had been terminated. Pet. App. 44, 157-158.

3. The court of appeals affirmed and granted enforcement of the Board's order, except with respect to the Board's finding that the May layoffs violated Section 8(a)(3) and (1). Pet. App. 1-26.[5]

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[3] The Board found further support for this conclusion in the fact that, less than a month after the move, petitioner had solicited signatures on a petition by which its employees at Madison Heights could disavow support for the Union. Pet. App. 40.

[4] Chairman Dotson dissented from these findings with respect to the May and June layoffs and found it unnecessary, in view of his conclusion that the relocation in August was a violation of Section 8(a)(3), to reach the question whether petitioner had violated the Act by refusing to bargain over that subject. Pet. App. 47 n.1, 50-51.

[5] On the Union's appeal, the court remanded to the Board for further consideration of the necessity for inclusion of a visitatorial order, which the Board had found unwarranted. Pet. App. 23.

a. The court upheld the Board's findings that petitioner's managers, McGalliard and Dickenson, had "engaged in conduct designed to coerce employees into repudiating the Union" (Pet. App. 14) and thus affirmed the Board's conclusions that their threats to employees and miscellaneous other actions violated Section 8(a)(1) of the Act (Pet. App. 13-15).

b. The court also found substantial evidence to support the Board's determinations that petitioner had violated Section 8(a)(5) and (1) of the Act by failing to bargain over the effects of the layoffs in May and June, by unilaterally changing its driver dispatch procedure, and by failing to bargain over the discharges of seven drivers in August. Pet. App. 16-17. The court did not reach the issue whether petitioner was obligated to bargain over the decision to relocate its Montvale operation, explaining that its conclusion that the relocation was a violation of Section 8(a)(3) made it unnecessary to address that question. Pet. App. 17.

c. The court then addressed the Board's findings that petitioner violated Section 8(a)(3) and (1) by laying off employees in May, June, and August and by relocating to Madison Heights. The court determined that petitioner's "early open hostility toward Union activity and its 8(a)(1) violations are clearly sufficient to establish a *prima facie* case that antiunion considerations were a motivating factor in its decisions" to lay off the Montvale employees in June and to close down and relocate that terminal in August. Pet. App. 20. The court also found "substantial evidence to support the Board's conclusion that [petitioner] 'failed to prove a legitimate [business] reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights.' " *Ibid.* With respect to the June layoffs, the court found that petitioner's records evidenced

nothing "but that its asserted economic defense is a mere pretext" (*id.* at 21).

Finally, the court reversed the Board's finding that the May layoffs violated Sections 8(a)(3). Pet. App. 22. Citing evidence that there were "substantial business concerns sufficient to prompt the layoff of two employees in early May," the court concluded that the record "clearly supports a finding that [petitioner] would have laid off two employees in May without regard to antiunion considerations." *Ibid.*

ARGUMENT

This case involves the application of well-established legal principles to the particular facts. In the final analysis, the only question presented is whether the record contains substantial evidence to support the Board's findings as to the motivation underlying petitioner's decisions to lay off workers and relocate its Montvale operation. That fact-bound question does not warrant this Court's review.

1. In this Court, petitioner contests only the determinations that it violated Section 8(a)(3) and (1) of the Act by laying off workers in June and August and relocating its Montvale facility. Thus, it does not challenge the Board's findings, upheld by the court of appeals, that it violated Section 8(a)(1) and (5) of the NLRA by (i) repeatedly threatening that it would close the Montvale facility or fire employees if the Union won the right to represent a bargaining unit at Montvale, (ii) unilaterally imposing terms on its employees without bargaining in good faith, and (iii) participating in an illegal attempt to decertify the Union.

Petitioner argues, however, that a sharp line should be drawn between these unequivocal indications of its anti-

union animus and what it characterizes as a "a concurrent but logically and factually unrelated decision to relocate its Montvale/Roanoke terminal operations to Madison Heights." Pet. 8. It also claims that the court of appeals overlooked "uncontradicted," "indisputable," or "undeniable" evidence of legitimate business reasons for relocating that terminal and scaling down its operations (*id.* at 12, 14, 15, 16, 26, 27, 39).

Obviously, neither the Board nor the court of appeals was obligated to adopt petitioner's view of the evidence. In this case, petitioner threatened to close its Montvale terminal and fire employees if the Union won the representation election. Within five months of the time that 16 of its 22 employees voted to be represented by the Union, petitioner relocated and laid off a number of its Montvale employees, including all but two of the employees who had exercised their right to strike. Under these circumstances, the Board was entitled to draw the natural inference that petitioner's actions were motivated by anti-union animus. The Board was not required to regard petitioner's clearly established efforts to coerce its employees and its refusals to bargain with the Union as separate from the question of why petitioner scaled down and relocated its Montvale operation shortly after it was unionized.[6]

Petitioner's contention that the court of appeals and the Board overlooked uncontradicted evidence of legitimate

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[6] Elsewhere in the petition, petitioner contends that its various attempts to coerce employees into rejecting the Union "*predated*" the decision to relocate or occurred "in other contexts." Pet. 20, 22, 25. It also suggests that evidence of petitioner's anti-union animus was "separate from," or "related to actions other than," the layoff and relocation decisions and that, at best, it was "indirect" evidence. *Id.* at 23-24, 30, 31. The Board and the court of appeals properly refused to accept these artificial characterizations of the proof in this case.

business reasons for its actions is equally unfounded. The ALJ, the Board, and the court of appeals each addressed the reasons that petitioner proffered for these decisions and rejected them as pretextual. For instance, while petitioner contends that its president's testimony that Kroger would save $80,000 per year as a result of the relocation was "uncontradicted" (Pet. 12), the ALJ found that this testimony was "a complete fabrication" and also cited testimony by Kroger's traffic analyst that Kroger had not requested the relocation (Pet. App. 134; see *id.* at 38). The court of appeals properly refused to disturb the Board's finding on this point as well as its many other similar judgments as to the probative value and weight of petitioner's evidence.

Petitioner's attack on the court of appeals' opinion rests upon its understandable unhappiness with factual findings that the Board made and the court of appeals upheld. The Board's findings are subject to review only to determine whether they are supported by "substantial evidence." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, this Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

2. Petitioner's argument that the court of appeals improperly shifted the burden of proof on the question of unlawful intent (Pet. 18-39) mischaracterizes that court's reasoning and confuses the respective roles of the Board and the courts of appeals under the analytical framework that this Court approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

An employer may violate Section 8(a)(3) of the NLRA without acting *solely* on the basis of an unlawful motiva-

tion. *Transportation Management Corp.*, 462 U.S. at 398. As the Act has been construed by the Board for over 50 years, the General Counsel need only prove, by a preponderance of the evidence, that anti-union animus was a "substantial" or "motivating" factor in the employer's decision. That understanding of the Act raises the possibility that violations will be found in mixed-motive cases, *i.e.*, cases in which discrimination against employees was motivated in part by unlawful anti-union animus and in part by legitimate economic concerns. In those cases, the Board has construed the statute as providing an affirmative defense to employers who can demonstrate that they would have engaged in the same action even in the absence of the unlawful intent to discourage union activity. This construction of the statute (*id.* at 401):

> permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c).[7]

Petitioner argues that the Board and the court of appeals departed from this framework by failing to "weigh[] the 'preponderance' of all the direct and the indirect evidence on the layoff and relocation issues before concluding that the General Counsel proved a *prima facie* case on those issues and that [petitioner] had the burden of proof on an affirmative defense." Pet. 23-24. This argu-

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[7] Section 10(c) of the Act, 29 U.S.C. 160(c), requires the General Counsel to establish an unfair labor practice by "a preponderance of the testimony * * *."

ment is unfounded, with respect to both the Board and the court of appeals.

a. The Board's lengthy opinion leaves no doubt that it carefully considered and rejected petitioner's arguments that business considerations underlay its decision to relocate to Madison Heights and lay off employees in June and August. Both the ALJ and the Board analyzed the economic considerations that petitioner advanced and concluded, in each instance, that petitioner's evidence was unworthy of belief or that those considerations did not account for the actions petitioner took. In fact, the Board concluded that those economic considerations were a pretext—*i.e.*, that this was not even a case in which an employer acted on the basis of mixed motives, as opposed to singleminded anti-union animus. See Pet. App. 35-36 (approving ALJ's findings that economic justifications advanced for June layoffs were "a pretext"); *id.* at 39 (petitioner "failed to demonstrate a legitimate reason why it decided to operate a scaled-down facility of 8 drivers in Madison Heights"). In any event, the Board's lengthy and detailed decision provides no support for the propositions that petitioner's economic justifications were ignored and that petitioner's liability turned on the placement of the burden of proof on the issue of intent.

b. The court of appeals applied the analytical framework approved by this Court in *NLRB* v. *Transportation Management Corp., supra,* to this decision. Pet. App. 19-21.[8] Citing an excerpt from the court's analysis,

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[8] In our view, the court would have been fully justified in upholding the Board's findings of violations on the ground that petitioner's asserted economic defenses were a pretext—*i.e.*, that petitioner had not even demonstrated that legitimate economic concerns played *any* part in its decisions to lay off employees in June and to relocate and scale down its Montvale operation. The Board reached that conclu-

petitioner complains that the court failed to weigh evidence of economic justifications in determining whether the General Counsel had made a *prima facie* case that anti-union animus was a "substantial" or "motivating" factor in petitioner's decisions to relocate and lay off most of the union's supporters in its Montvale operation. Pet. 19. In petitioner's view, the court erroneously held that a *prima facie* case had been established without "pretending to weigh all of the evidence of the layoff and relocation issues." *Id.* at 25; see also *id.* at 29.

The fundamental flaw in this argument is that it is not the court of appeals' function under *Transportation Management Corp.* to "weigh" evidence relevant to an employer's motivation for discrimination against its employees. Rather, the court's only task is to ascertain whether there was "substantial evidence" to sustain the Board's findings that an employer has acted on the basis of an unlawful motive and, in a case where an employer attempts to establish the affirmative defense recognized in *Transportation Management Corp.*, that the employer's

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sion, and there was substantial evidence to support its determination. Had the case been viewed in those terms, it would have been unnecessary for the court of appeals even to consider whether petitioner had established the affirmative defense recognized in *Transportation Management Corp.* See *Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982); *Babcock & Wilcox Co.*, 257 N.L.R.B. 707, 707 n.1 (1981); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983); *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38-39 (2d Cir. 1981); *The Artra Group* v. *NLRB*, 730 F.2d 586, 591-592 (10th Cir. 1984). Petitioner was not prejudiced by the approach the court of appeals took, however. To the contrary, the court's starting point—that this was a "dual motive" case governed by the order of proof approved in *Transportation Management Corp.* (see Pet. App. 19)—was more favorable to petitioner than the Board's findings justified.

action would not have occurred in the absence of that unlawful motive.

Viewed from this perspective, the court of appeals' analysis did not relieve the Board's General Counsel of the burden she carried before the Board—that is, to demonstrate by a preponderance of all of the evidence that anti-union animus was a "substantial" or "motivating" factor in petitioner's decisions to relocate and lay off employees. Rather, in view of the wealth of evidence of petitioner's threats and of its resistance to the union, and the insubstantiality of petitioner's asserted business justifications, the court found substantial evidence supporting the Board's conclusion that petitioner's economic defenses were insufficient. The substantial evidence standard of review did not require or permit the court to determine whether the Board had properly weighed the evidence. Under that standard, courts must defer to the Board's determinations with respect to the credibility of witnesses and the probative value of evidence introduced by the parties.

In short, petitioner's economic arguments were fully considered and rejected by both the Board and the court of appeals.[9] Moreover, the order of proof in cases brought under Section 8(a)(3) and the standard of review applicable to Board findings have been clearly established in prior decisions of this Court. Thus, the case raises no novel or unsettled issue of law of the sort appropriate for this Court's consideration.

3. Finally, petitioner contends that the order of proof in Title VII disparate treatment cases should be applied to

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[9] The fact that the court reversed one of the Section 8(a)(3) violations found by the Board—the violation based on the layoff of two employees in May—refutes any claim that the court of appeals denied petitioner the benefit of any defenses available within the framework of *Transportation Management Corp.*

alleged violations of Section 8(a)(3). Pet. 37. This case does not present that question. The order of proof applied in *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), sets forth the elements of and defenses to a circumstantial case of discriminatory intent for purposes of Title VII. Here, the Board's General Counsel did not rely on circumstantial evidence of anti-union intent; she introduced evidence of explicit threats and other resistance to the Union that fully justified the Board's conclusion that petitioner's motivation was unlawful. Thus, this case does not raise the question whether some version of the framework applied in Title VII disparate treatment cases should be applied to actions under the NLRA in order to facilitate proof of Section 8(a)(3) violations where only circumstantial evidence of anti-union animus is available. And, for the reasons set forth above, petitioner's contention that it was held to have violated Section 8(a)(3) on the basis of the placement of the burden of proof is completely without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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